RECENT AMERICAN DECISIONS.

Supreme Court of Michigan.

HEYMAN v. COVEL.

Property of A. taken on an execution against B. is not in the legal possession of the court issuing the execution (unless, perhaps, where there is a mandate to levy on the specific goods). Therefore the fact that property is levied upon by the United States marshal, under an execution from a United States court against B., does not prevent A. from maintaining his title by replevin in a state court.

Freeman v. *Howe*, 24 How. 450, and *Buck* v. *Colbath*, 3 Wall. 334, distinguished.

ERROR to Kent.

Norris & Uhl, for plaintiff in error.

Butterfield & Withey, for defendant in error.

The opinion of the court was delivered by

CAMPBELL, J.—Mrs. Heyman, the plaintiff, sued defendant in replevin for certain goods, which, as we understand the finding, the court below held were unlawfully taken from her by defendant, but nevertheless gave judgment in his favor. Defendant, at the time the goods were replevied, held them as United States deputy marshal, under an execution issued from the Circuit Court of the United States for the Western District of Michigan, against one Adolph Heyman, who was plaintiff's husband. There are no legal conclusions set out in the finding, and there are some facts set out, which would seem to indicate that there were questions discussed concerning the validity of plaintiff's title. We have had some doubt whether the court below did not err in failing to find more specifically as requested. But the facts actually found show title in plaintiff and show nothing to controvert it. We shall assume, therefore, what has been assumed by counsel for both parties, that the ground of the decision was, that defendant's possession, though wrongful, must prevail over state process, issued in favor of the real owner. And we shall consider the record as involving the question, whether the United States marshal, by seizing the property of a stranger to the execution in his hands, can cut off the right of the owner to recover his property thus wrongfully seized. For the right is effectually cut off if it cannot be replevied in the state court, when there is no remedy provided by law for trying the title anywhere else.

The case supposed to stand in the way of this remedy is *Freeman* v. *Howe*, 24 How. 450. The language of that case does, when taken by itself, tend to sustain the claim of the defendant, and if it were applicable here, and not affected by subsequent decisions, we should be disposed (as stated in *Carew* v. *Mathews*, 41 Mich. 476) to regard it as perhaps disposing of the case. But when this decision is considered in the light of other decisions, which are recognised as binding in the United States courts, we think it has no force when applied to the issue before us. The only ground of the decision was, that the property there in controversy was in the custody of the United States court, for legal purposes, and that an effectual remedy existed in that court to try and determine the rights of the adverse claimant. If this was so, there was little room for discussion. The remedy there suggested was a bill in equity, which it was said would not be treated as a separate suit, but only as a collateral proceeding in the same suit. And reference was there made to some other cases in which the question decided was, not whether one jurisdiction could interfere with another, but whether the remedy in equity was a proper remedy to protect the particular rights in controversy. In *Freeman* v. *Howe*, there can be little doubt that there was a remedy in equity so far as the subject-matter was concerned, for the complaining parties were railroad mortgagees in trust, and the property replevied by them was taken in that capacity against a levy, not by execution but under mesne process.

There was certainly some force in the suggestion that the remedy was there adequate, and the fact that the property was in the custody of the court was assumed. Possibly that is true in some cases, in regard to property held under mesne process. But such has not been the view concerning property held under final process, and it has been uniformly held that a marshal is a trespasser, and in no way protected by his process when he seizes the property of a stranger.

In *Buck* v. *Colbath*, 3 Wall. 334, the action was trespass, and therefore, all that was said about other remedies was *obiter*. But it was distinctly intimated that the difficulty did not arise, except concerning property actually or constructively in the possession of the court, and while litigation was still pending. Property under mesne process is in some cases the only basis of jurisdiction, and it is often subject to disposition for various purposes *pendente*

lite, so that it may not only be discharged from seizure, but may sometimes be dealt with otherwise. This creates at least a colorable if not a real distinction, and may give some force to the claim that it is in the custody of the court, although we are not prepared to say the distinction is usually in fact very important. The case of *Buck* v. *Colbath* is significant in confining the doctrine of conflict to interference with the action of courts, and in holding that a marshal who levies on the property of a stranger is in no sense acting under process, unless the writ directs the seizure of the specific property taken. The distinction between writs against specific property and those against undescribed property of named persons is made the turning point. And it was said emphatically that the plaintiff in error is mistaken when he asserts that the suit in the federal court drew to it the question of title to the property, and that the suit in the state court against the marshal could not withdraw that issue from the former court. No such issue was before it, or was likely to come before it, in the usual course of proceeding in such a suit.

In the subsequent case of *McKee* v. *Rains*, 10 Wall. 22, it was held that a trespass suit by a third person against a marshal could not be removed into a court of the United States, because his levy could not be regarded as made under any authority of the United States. This is certainly equivalent to holding that he is no better off than if he had no process, and it is difficult to conceive how it leaves any room for holding that a disturbance of his wrongful possession is an interference with the court.

It would not be, we suppose, competent for Congress or any state, even by positive enactment, to deprive the owners of property of the right to vindicate their title by legal process in a judicial trial. There is no legislation which provides any method whereby Mrs. Heyman could secure her rights in the United States court against Covell. Unless she has such a remedy in due form of law her only resort must be to the state courts, and this is recognised in *McKee* v. *Rains*, as well as in *Slocum* v. *Mayberry*, 2 Wheat. 2. It was indeed held, in *Freeman* v. *Howe*, that equity would relieve in that particular instance, and it was said that it would, in any case of wrongful levy on a third person's goods. If this were so, the case would not be difficult of redress. But it has since been held that there is no such remedy. In *Van Norden* v. *Morton*, 99 U. S. 378, a bill in equity was filed in the Circuit

Court of the United States for the district of Louisiana, to secure protection and restoration against a marshal's levy under an execution from the same court, and the Circuit Court made such a decree. But on appeal to the United States Supreme Court it was held, that replevin was the proper remedy to regain possession, or some similar proceeding in the nature of a common-law replevin, and that equity had no jurisdiction. The decree was reversed for want of jurisdiction, without prejudice to an action at law or other redress.

If there is no remedy by bill in equity, then it follows that a common-law action is the proper redress, and such an action can only be brought in a court of the United States where the parties are such as to confer jurisdiction; and in such cases, the statutes have made the jurisdiction concurrent with power of removal, under certain circumstances. In the present case, it does not appear that suit could have been brought anywhere but in the state court, and the case has gone to judgment in the usual course. We think there was no ground for refusing redress to plaintiff, and that she was entitled to judgment on the finding.

Judgment must be reversed with costs, and judgment entered for plaintiff with nominal damages of six cents.

COOLEY, J.—My brethren may be right in their view that the later decisions of the Federal Supreme Court have, in effect, overruled *Buck* v. *Colbath*, but I prefer to await an authoritative declaration to that effect, by the court itself.

RULE.—Whenever property has been seized by an officer of a court, by virtue of its process, the property is to be considered as in the custody of that court, and under its control for the time being, and no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises: *Buck* v. *Colbath*, 3 Wall. 341; *Peck* v. *Jenness*, 7 How. 625; *The Oliver Jordan*, 2 Curt. 415; *Brown* v. *Clarke*, 4 How. 4; *The Robert Fulton*, 1 Paine 621; *Keating* v. *Spink*, 3 Ohio St. 105. *Taylor* v. *Carryl*, 20 How. 583; *Hagan* v. *Lucas*, 10 Pet. 400; *Munsen* v. *Harroun*, 34 Ill. 422; *Samuel* v. *Agnew*, 80 Id. 556; *Parker* v. *Smith*, 3 Bradw. (Ill.) 356.

REASONS.—With regard to cases involving seizures made on land or water for breach of laws of the United States, the statute conferring upon the federal courts exclusive jurisdiction of such cases, forms in itself sufficient reason for the existence and enforcement of the rule; and in criminal cases, as where a federal court, for example, is asked to issue a writ of *habeas corpus* to bring before it one committed under state process, the denial of the writ rests upon

the statutory prohibition against issuing it save where the prisoner is "in custody under or by color of the authority of the United States." But the rule rests ultimately upon broader foundations than statutory provisions. Its objects are the prevention of unseemly contests for the mere possession of persons or property, and above all else, the avoidance of dangerous conflicts between the state and national authorities: *Hagan* v. *Lucas*, 10 Pet. 400; *The Oliver Jordan*, 2 Curt. 415; *The Robert Fulton*, 1 Paine 626; and see *Keating* v. *Spink*, 3 Ohio St. 120; *Peck* v. *Jenness*, 7 How. 625.

ILLUSTRATIVE CASES.—The conflict has most frequently arisen between the state and federal courts. In *Slocum* v. *Mayberry*, it was held, that the courts of the United States having exclusive jurisdiction of all seizures made on land or water for a breach of the laws of the United States, any intervention of a state authority, which, by taking the thing seized out of the hands of the United States officer, might obstruct the exercise of this jurisdiction, is unlawful, and the right of the owner to bring replevin in a state court for a vessel seized for an attempted violation of embargo laws, was denied: *Slocum* v. *Mayberry*, 2 Wheat. 2.

In the case of the ship *Robert Fulton*, it was held, that a warrant of attachment from the Admiralty could not be lawfully executed, and that the United States District Court could not proceed *in rem*, a state court having already acquired jurisdiction by a previous levy of an attachment upon the vessel: *The Ship Robert Fulton*, 1 Paine 620; and see *The Oliver Jordan*, 2 Curt. 415.

In *Taylor* v. *Carryl* it was held, that where a vessel had been seized under process of foreign attachment issuing from a state court, and a motion was pending in that court for an order of sale, a libel filed in a federal court for mariner's wages, and process issued under it, could not divest the authorities of the state of their authority over the vessel; and of the two sales made, one by the sheriff and one by the marshal, the sale by the sheriff must be considered as conveying the legal title, and the sale by the marshal as inoperative: *Taylor* v. *Carryl*, 20 How. 583; and see *Keating* v. *Spink*, 3 Ohio St. 105; *The Royal Saxon*, 1 Wall. Jr. 311.

And where the marshal, by virtue of mesne process issuing out of the United States Circuit Court, attached certain railroad cars, which were afterwards taken out of his hands by the sheriff, under a replevin brought in a state court by mortgagees of the railroad company, the proceedings of the sheriff were held entirely irregular: *Freeman* v. *Howe*, 24 How. 450.

The rule protects property seized under execution, as well as that seized by virtue of an attachment; and this is true, though the officer making the first seizure release the property on bail or by taking a forthcoming bond for it. The taking of the bond does not release the property. It does not work a substitution of the bond for the property and leave the latter liable to process from another court. Thus, in *Hagan* v. *Lucas* the sheriff seized property under a valid process from a state court, and delivered it on bail to abide a trial of the right to the property and its liability to the execution. The same property was then seized by a marshal, under a federal execution against the same defendant; but it was held that the first levy, whether under federal or state process, and notwithstanding the bond was taken, withdrew the property from the reach of the process of the other court, and that the marshal took nothing by his levy: *Hagan* v. *Lucas*, 10 Pet. 400; see *Wiswall* v. *Sampson*, 14 How. 52; *Palliam* v. *Osborne*, 17 Id. 471; *Booth* v. *Ableman*, 3 Wallace 344; s. c. 7 Minn. 104, 314; *Peale* v. *Phipps*, 14 How. 368; and see *Munson* v. *Harroun*,

34 Ill. 422, and *Parker* v. *Smith*, 3 Bradw. (Ill.) 356, in which it was held that a state court will not interfere with the execution of final process from a federal court for the protection of a stranger alleging that his property had been tortiously seized in execution to satisfy the debt of another.

The possession of a receiver, a trustee or a sequestrator in chancery (there are many cases on this point; see, however, *Wiswall* v. *Sampson*, 14 How. 52; *Peale* v. *Phipps*, Id. 368), and the possession of an executive officer of the government is likewise protected from interference. Thus, the right to levy an attachment, issued out of a state court, upon imported merchandise in the custody of United States officers, but not entered at the custom-house, has been denied: *Harris* v. *Dennie*, 3 Pet. 292. And a United States District Court, proceeding in bankruptcy, cannot oust a state court of jurisdiction over the bankrupt's property previously attached by it: *Peck* v. *Jenness*, 7 How. 612.

Criminal cases are likewise within the scope of the rule. Thus, neither the Supreme nor any other federal court can issue a *habeas corpus* to bring before it, for any other purpose than to testify, a prisoner who is in custody under sentence or execution of a state court: *Ex parte Dorr*, 3 How. 103; see *Ex parte Robinson*, 6 McLean 355, where instances are given sustaining the above; and see *United States* v. *Booth*, 21 How. 523.

Conflicting Cases.—In *Slocum* v. *Mayberry*, a United States officer seized a vessel for an attempted violation of embargo laws. Finding a cargo on board, he refused on demand to deliver it to the owner, who brought replevin for it against him in a state court. The *vessel* only was seized; the *cargo* was not taken or held under federal or any other process. To bring replevin in a state court for the cargo was, therefore, not an interference with property in possession of a federal court, because that court did not have possession of the property, and the federal Supreme Court sustained the right to replevy it in a state court, but, however, expressly denied the right to replevy the *vessel* in the state court: *Slocum* v. *Mayberry*, 2 Wheat. 2. It is plain that the conflict in this case is only apparent and not real. The cargo was not in possession of a federal court, and therefore not within the rule protecting it from interference.

Basing their decisions upon this case, the Supreme Courts of New Jersey and Indiana, respectively, decided that where a United States marshal, under process from a federal court against A., seizes the goods of B., the latter may replevy them in a state court: *Bruen* v. *Ogden*, 11 N. J. L. 371; *Hanna* v. *Steinberger*, 6 Blackf. 520. But it is conceived that these cases are readily distinguishable from *Slocum* v. *Mayberry*, in which there was no interference by a state court with property in possession of a federal court. There was such an interference, however, in the other cases. The property replevied in those cases had been actually seized by a marshal, acting under valid federal process.

The cases of *Dunn* v. *Vail* and *Gilman* v. *Williams*, also affirm the right of a stranger, whose property has been tortiously seized under federal process, to replevy it in a state court: *Dunn* v. *Vail*, 7 Mart. (La.) 416; *Gilman* v. *Williams*, 7 Wis. 329. The conflict in these four cases is real and not merely apparent.

In Minnesota, the rule stated at the head of this note was followed, but reluctantly and with some adverse criticism. The court, after remarking that the object of the rule is the avoidance of a conflict between courts, says: "Whether this evil may be greater than that of always compelling a party in these cases to resort to the court out of which the process issued, upon which his

property has been seized, to assert his legal rights, may well be questioned." This objection to the rule does not seem entitled to much weight. If the decision of *Freeman* v. *Howe* is sound and be not overruled, the enforcement of the rule does not deprive the person, whose property has been wrongfully seized, of a competent tribunal in which to assert his rights. Besides his remedy in the federal court, he may maintain an action against the marshal for the trespass in wrongfully seizing the goods, and this action may be brought in a state court, for it is the possession of the property by the court, and not the protection of its officers in tortious seizures, which the rule seeks to secure. Trespass or any other action, which does not disturb the possession of the court, may be brought in a state court against the officer, whether he be marshal, sheriff or other federal or state official: *Buck* v. *Colbath*, 3 Wall. 334.

Admitting that the possession of the officer be wrongful and illegal, the question is: What tribunal shall decide whether it is so or not? If a state court so decides and takes the thing seized out of the hands of the officer, this is in effect a decision by a state court, that the federal court has no jurisdiction over the property. But it seems settled that to the federal courts alone belong the determination of questions touching their own jurisdiction. Quoting a remark of Chancellor KENT, that "if a marshal of the United States, under an execution in favor of the United States against A. should seize the person or property of B., then the state courts have jurisdiction to protect the person and the property so illegally invaded," (Kent Com., vol. 1, p. 410), Mr. Justice NELSON in *Freeman* v. *Howe*, says: "No doubt, if the federal court had no jurisdiction of the case, the process would be invalid, and the seizure of the property illegal, for which the aggrieved party is entitled to his remedy. But the question is, which tribunal, the federal or state, possesses the power to determine the question of jurisdiction or validity of the process? The effect of the principle stated by the chancellor, if admitted, would be most deep and extensive in its operation upon the jurisdiction of the federal court, as a moment's consideration will show. It would draw after it into the state courts, not only all questions of the liability of property seized upon mesne or final process, issued under the authority of the federal courts, including the admiralty, for this court can be no exception, for the purposes for which it was seized, but also the arrests upon mesne and imprisonment upon final process of the person in both civil and criminal cases, for in every case the question of jurisdiction could be made; and until the power was assumed by the state court and the question of jurisdiction of the federal court was heard and determined by it, it could not be known whether in the given case it existed or not. We need scarcely remark that no government could maintain the execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another:" *Freeman* v. *Howe*, 24 How. 459.

In the case of the *United States* v. *Booth*, Booth was imprisoned under a warrant of commitment from a federal court and a *habeas corpus* was issued by a state court, which decided that the detention of Booth by the federal authorities was illegal and discharged him. The United States Supreme Court reversed this decision and Chief Justice TANEY said: "But after * * * the state judge or court (is) judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus, nor any other process issued under state author-

ity can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him, if he is wrongfully imprisoned, their tribunals can release him and afford him redress."

"* * * No judicial process whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge, by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence:" *United States* v. *Booth*, 21 How. 523.

There seems to be no distinction taken in the cases sustaining the rule, as to mesne, or final, or civil process; persons or property held under either are equally within the scope and protection of the rule, and this whether the seizure or arrest be rightful or wrongful, legal or illegal.

But in Michigan, in *Carew* v. *Mathews*, it was held that replevin will lie in a justice's court to recover property wrongfully seized on federal process by a United States marshal. In this case, however, Judge COOLEY (who it is observable, does not entirely concur in the decision in the principal case), denied the application of the rule, and held replevin before the justice maintainable because, since the amount in controversy was below the jurisdictional limit of the federal court, the plaintiff was remediless, unless allowed to sue in a state tribunal. And he further says: "It might be very proper and suitable to provide by statute some method in which one whose property has been seized on an execution against the property of another might have it released immediately on giving a forthcoming bond, or might have his claim summarily tried. But no such method is now provided. If the owner under such circumstances would recover his property *in specie*, he must resort to replevin. Take away his right to bring replevin, and however inadequate it may be in some cases, he is limited to the remedy in damages. In many cases this would be utterly inadequate. And there is not a sentence or line in *Freeman* v. *Howe*, which affords any countenance to the doctrine that the federal court must hold exclusive jurisdiction of such a case, when from the circumstances it is incompetent to give the same full and effectual redress that the state courts may afford:" *Carew* v. *Matthews*, 41 Mich. 576.

The federal Supreme Court in *Van Norden* v. *Morton*, 99 U. S. 378, affirmed the right to maintain replevin against the marshal in a state court, and denied that there was any remedy in equity in the United States court. But none of the cases holding the contrary doctrine were referred to, and it does not appear that counsel called the attention of the court to them. It seems remarkable, to say the least, that the court should overrule *Freeman* v. *Howe*, and the other cases sustaining the rule, without once alluding to the reason upon which it rests, or to the decisions by which it was established.

The principal case follows *Van Norden* v. *Morton*. But the reason of the rule, the avoidance of a conflict between the federal and state judiciaries, is not discussed. But four of the cases touching the subject were cited by the court (or from all that appears from the report), brought to its notice. And it may be questioned whether the Supreme Court of the United States would sustain *Van Norden* v. *Morton*, if the point came again before it and received fuller argument and more careful consideration.

The reason of the rule, the prevention of an embarrassing conflict between courts, applies as well to cases where a stranger's property is seized as to any other. But the remedy of the stranger on the equity side of the federal court would, certainly in some cases, be more expensive and inconvenient than replevin in a state court, and it is not

intimated that in equity he can secure the immediate return *in specie* of the property upon bond being given as in replevin. The court, in *Freeman* v. *Howe*, thought that the remedy afforded in equity was more effectual than replevin. The question is not free from difficulty, and the state of the decisions is such as to make it hazardous to say whether the conflicting cases would be overruled and their conclusions declared unsound law, were the question to come squarely before the United States Supreme Court, or whether they would be sustained, and the rule stated at the head of this note declared inapplicable to cases where, under process against one person, the property of another, a stranger to the writ, has been seized.

LIMITATIONS OF THE RULE.—The right of interference by courts having direct supervisory control over the court whose process has first taken possession, or by some superior jurisdiction in the premises, is admitted by the terms of the rule itself. And it is only while the property is in possession of the court, either actually or constructively, that the court is bound or professes to protect that possession from interference by other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. In such cases no contest arises about the mere possession, and no conflict but such as may be decided without unseemly and discreditable collision. Thus in *Day* v. *Gallup*, the property attached had been sold and the attachment suit ended when the attaching officer and his assistants were sued, and the federal Supreme Court held that such suit in a state court, commenced after the proceedings in the federal court had been concluded, raised no question or the jurisdiction of the United States Supreme Court: *Day* v. *Gallup*, 2 Wall. 197; *Buck* v. *Colbath*, 3 Id. 341.

And the rule is confined in its operation to the parties before the court, or who may, if they wish to do so, come before it and have a hearing for the protection of their interests. Strangers to the original suit, whose property has been tortiously seized, or any one interested in the possession of property in the custody of a federal court, may by petition or bill on the equity side of the court make themselves, so far parties to the proceedings in which the property has been wrongfully taken, as to have their interests protected, and this is true, although the persons representing adverse interests in such case, do not possess the qualifications of citizenship necessary to enable them to sue each other in the federal courts; such a suit is not an original suit, but is ancillary, dependent and supplementary merely to the original suit, out of which it has arisen, and it is maintainable without reference to the citizenship or residence of the parties: *Buck* v. *Colbath*, 3 Wall. 345; *Freeman* v. *Howe*, 24 How. 450.

The power of the court upon the bill, is not limited to a case between parties to the original suit; any party may file the bill whose interests are affected by the suit at law: *Freeman* v. *Howe*, 24 How. 460, and cases cited.

RETURN.—A sheriff or marshal, finding property upon which he seeks to make a levy already in possession of an officer of another court acting under its process, should return that such is the fact, and not seek to deprive the first officer of his possession: The *Robert Fulton*, 1 Paine 620.

REMEDIES.—But where property in possession of an officer of one court is by him surrendered to, or is actually seized and taken from him by, an officer acting under process from another court, there are several remedies. Besides

the remedy by trespass or trover already alluded to, the officer surrendering the property is liable to the creditor: *Keating* v. *Spink*, 3 Ohio St. 105; and the officer receiving or seizing the property may himself release the levy and return the property: *Weber* v. *Henry*, 16 Mich. 460; and the court issuing the second process has power to compel a restoration of the property to the officer who surrendered it, or from whom it was taken, and it should exercise this power by ordering a return: *Booth* v. *Ableman*, 16 Wis. 460. Or the court from whose possession the property was taken, may enforce its return by attachment for contempt or other summary process: *Slocum* v. *Mayberry*, 2 Wheat. 2.

M. D. E.

Supreme Court of Iowa.

McCLEARY *v.* ELLIS.

A conveyance in fee-simple cannot contain a valid condition in restraint of alienation.

If the grantor parts with the fee it makes no difference that the conveyance is to one grantee for life and another in remainder. A condition in restraint of alienation, either voluntary or involuntary, of the life-estate, is void.

Land conveyed to A. for life, with remainder over to his children, with a condition that A.'s interest shall not be sold either by him or his creditors, is nevertheless liable to execution by A.'s creditors.

Nichols v. *Eaton*, 91 U. S. 716, distinguished.

ACTION by plaintiff, against one of the defendants, as sheriff, who had sold, under execution against plaintiff, plaintiff's interest in certain land conveyed to him by his father, to restrain such defendant from executing to the purchaser at the sale, another defendant, a sheriff's deed. Plaintiff claimed in his petition that by a condition in his father's deed to him, the land could not be alienated and was not liable to be sold for his debts. To the petition defendants demurred, but the purchaser offered to release from the operation of the sale the homestead to which plaintiff was entitled by law. The court below sustained the demurrer, from which plaintiff appealed.

The deed to plaintiff contained the following *habendum* clause: "To have the above-described lands his lifetime and to go to his children at his death; but if he dies without children, then the above-described land to go to his brother, George McCleary, and at his death to go to his brother's children, that is, George McCleary's children; but if George dies without children, it is to go to his sister's children. It is expressly understood that he shall